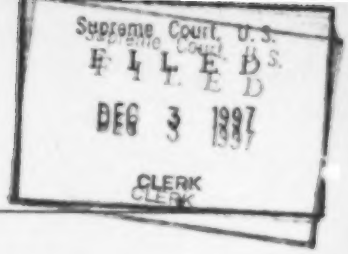
Case No. 97-613
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997



JAMES P. MURPHY,

Petitioner,

v.

AARON LINDH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, by his undersigned attorney, hereby moves to be permitted to file a response to the petition for writ of certiorari in this Court in forma pauperis, pursuant to Rule 39, Rules of the Supreme Court of the United States, on the basis of the attached affidavit.

Respondent sought and was granted leave to proceed in forma pauperis in the United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit, below. He also sought and was granted leave to proceed in forma pauperis in the Supreme Court of the United States when this case was previously before this Court in Case No. 96-6298.

Dated this 3rd day of December, 1997.

Respectfully submitted,

KEITH A. FINDLEY
Counsel of Record
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

24pp

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AFFIDAVIT IN SUPPORT OF
REQUEST TO PROCEED IN FORMA PAUPERIS

I, Aaron Lindh, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefore, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? ☒Yes ☐No

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

$150.00 a month
Badger State Industries
c/o CCI P.O. Box 900
PORTAGE, WI 53901

b. If the answer is no, state the date of last employment and the amount of salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources.

a. Business, profession or other form of employment: ☐Yes ☒No

b. Rent payments, interest or dividends: ☐Yes ☒No

c. Pensions, annuities or life insurance payments: ☐Yes ☒No

d. Gifts or inheritances: ☒Yes ☐No

e. Any other sources: ☐Yes ☒No

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

Approximately $100.00 from friends and family

3. Do you own any cash, or do you have money in a checking or savings accounts? ☒Yes ☐No .

If the answer is yes, state the total value of the items owned.

100.00 in general money

250.00 in savings account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ☐Yes ☒No

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. no one

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Aaron Lindh
AARON LINDH

Subscribed and sworn before me
this 31 day of Nov, 1997

Notary Public, State of Wisconsin
My commission expires: 11022'98

No. 97-613

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Aaron Lindh have a Sixth Amendment right to confront his accusers at the insanity phase of his bifurcated but "continuous" criminal trial, at which the jury determined whether he was "guilty" or "not guilty by reason of mental disease or defect"?

2. Did the state trial judge, under the totality of the relevant circumstances, violate Aaron Lindh's Sixth Amendment right to confront his accusers when the judge altogether foreclosed cross-examination of the state's star psychiatric witness as to the bias arising from the fact that, at the time of the witness's evaluation of Lindh and testimony at Lindh's trial, the witness knew that he was himself facing possible criminal prosecution and loss of his medical license based upon his own criminal sexual misconduct with his patients?

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REASONS FOR DENYING THE WRIT

I. WISCONSIN'S BELATED CLAIM THAT THE CONFRONTATION CLAUSE DOES NOT APPLY TO WISCONSIN'S BIFURCATED BUT "CONTINUOUS" INSANITY TRIAL PROCEDURE DOES NOT PRESENT A PROBLEM THAT REQUIRES RESOLUTION BY THE COURT.

There is nothing significant about this case any longer that requires this Court's attention.[1] This Court has already reviewed this case once, and reversed and remanded the Seventh Circuit's prior en banc decision. *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 1059 (1997). The Court's decision resolved all issues of broad interest in the case, leaving only a single, routine issue involving the application of particular facts to a long-established rule, which the court of appeals resolved pursuant to the Court's mandate. In *Lindh*, this Court ruled that the relevant portions of the new habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 are not retroactive, and that, accordingly, the Seventh Circuit erroneously applied those new provisions to deny Lindh's pre-existing habeas petition. This Court had an opportunity to address the merits of this case at that time, but expressly limited its grant of certiorari to the retroactivity question. *See* Order of the Supreme Court of the United States granting the petition for a writ of

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[1]The facts of this case are amply stated in the Certiorari Petition previously filed by Aaron Lindh in this Court in Case No. 96-6298 and in the original Seventh Circuit en banc decision, particularly the separate opinion of Judge Wood (which was later accepted in large part by the majority panel decision). *Lindh v. Murphy*, 96 F.3d 856, 879-80 (en banc) (Wood, J., dissenting) (Pet. App. A.53-55). The facts are not accurately or fully stated in the present Certiorari Petition. For example, the petitioner ("Wisconsin" or "the State") claims that "[w]e do not know what Roberts would have answered if asked if his hospital privileges at University Hospital had been suspended...." Cert. Pet. at 27. The State knows full well, however, that Roberts's hospital privileges had indeed been suspended (*see* Pet. App. A.54), and that he would have answered "yes"—unless the State intends to suggest that it would have sat idly by and allowed him to commit perjury by denying the suspension. The State also suggests that the claims against Roberts were but mere allegations, and omits that, after Lindh's trial, Roberts was convicted of sexual exploitation of his patients based upon the allegations being investigated at the time of Lindh's trial. *State v. Lindh*, 161 Wis. 2d 324, 350, n.11 , 468 N.W.2d 168 (1991). Because such factual errors do not determine the merits of the Certiorari Petition, however, they are not belabored further here.

certiorari, limited to Question 1 in the petition (the retroactivity question), in *Lindh v. Murphy*, Case No. 96-6298 (January 10, 1997). Following the remand from this Court, the Seventh Circuit applied pre-existing habeas law, and reached a different conclusion from the one it reached under the very different standard of review that it read the AEDPA to require. This case is now simply a mine-run example of a lower federal court exercising its authority under an old version of the federal habeas corpus statutes to evaluate the constitutionality of a state court trial by applying highly case-specific facts to a long-established Sixth Amendment confrontation rule.

The State professes now to be "baffled" by the Seventh Circuit's changed conclusion regarding the constitutionality of Lindh's state court trial. Cert. Pet. at 20. But it should have come as no surprise that a decision under the old habeas statutes—which granted the federal courts plenary review powers—might dictate a decision different from that required under the AEDPA, which the Seventh Circuit read to limit drastically a federal court's authority to reject a state court ruling, even if the federal court believed the state decision to be constitutionally wrong. That was why the retroactivity of the AEDPA was such a hotly contested issue when the Court granted certiorari. As the Court knows, Judge Easterbrook's opinion for the en banc majority (the opinion that this Court reviewed in *Lindh*) forthrightly noted that, under the circuit court's interpretation of the AEDPA, it lacked power to disagree with the Wisconsin Supreme Court's "fact-specific" decision unless that decision could "be called 'unreasonable' even if it is wrong (*as some members of this court who join this opinion believe*)." *Lindh v. Murphy*, 96 F.3d 856, 877 (7th Cir. 1997) (en banc) (Pet. App. A.48) (emphasis added). It thus can come as no surprise that, when this Court remanded for reconsideration under the pre-existing habeas standard, requiring plenary review of whether the outcome in state court was unconstitutionally erroneous under well-established law, the circuit court

found such error on the facts of the case.

The routine nature of the fact-specific Confrontation Clause issue in this case, once the AEDPA issues were removed, was noted by the Seventh Circuit itself in its original decision, which characterized the claim now before this Court as whether "the state's courts misapplied settled law to the facts of his case. Such a contention had no prospect in 1991 [when Lindh elected initially to file a habeas corpus petition in the district court rather than immediately seek certiorari review in the Supreme Court] of receiving an audience in the Supreme Court of the United States ...." *Lindh v. Murphy*, 96 F.3d at 866 (Pet. App A.26).

Wisconsin itself took this same position after this Court remanded the case to the Seventh Circuit. In asking the circuit court to return the case to the three-judge panel rather than the en banc court, the State pointed out that "[t]he underlying issues raised in this case are not sufficiently novel or unique to require an en banc panel. ... This case has already consumed enough of the court's time and public fisc in briefing and argument." Respondent-Appellee's "Statement of Position Pursuant to [Seventh] Circuit Rule 54 As to Action to be Taken by this Court Upon Remand from the United States Supreme Court," at 2. Among the issues that the State claimed were insufficiently novel or unique for en banc consideration was the question, on which it now puts so much stock, whether the Confrontation Clause applies to the procedure through which Wisconsin adjudicates criminal defendants' insanity defense.

The State has only recently come to the conclusion that this issue is worth mentioning *at all*: Throughout the proceedings at trial, on Lindh's appeal to the Wisconsin Court of Appeals, and on appeal to the Wisconsin Supreme Court, the State never once so much as suggested that the Confrontation Clause was inapplicable at the insanity phase of Lindh's bifurcated criminal trial.

Instead, the State confronted Lindh's confrontation claims head on, and argued that the limitation on cross-examination for bias in this case did not violate the Constitution.

Moreover, the Wisconsin Supreme Court expressly applied Confrontation Clause analysis in this case, citing the relevant Confrontation Clause decisions of this Court, without a hint of doubt that the proceeding was a type to which the Confrontation Clause is inapplicable.[2] *See State v. Lindh*, 161 Wis. 2d 324, 468 N.W.2d 168 (1991). As Judge Wood explained in her dissent to the original en banc decision, which was then adopted on remand by the panel (Pet. App. A.3):

> In its opinion in Lindh's case, the Wisconsin Supreme Court indicated that the Confrontation Clause of the Sixth Amendment, as well as its analog in Article I, section 7 of the Wisconsin Constitution, applies to the phase two proceeding. See *State v. Lindh*, 161 Wis.2d 324, 468 N.W.2d 168, 175 (1991). On one level, that is almost enough for us, because it tells us the significance Wisconsin attaches to this stage of the proceedings.

Lindh v. Murphy, 96 F.3d 856, 881 (en banc) (Wood, J., dissenting) (Pet. App. A.52). Indeed, so far as we have been able to tell from a comprehensive Westlaw search, the State has *never*, in any case, argued to the Wisconsin Supreme Court, nor has that court in any case ever suggested, that the Sixth Amendment and its state constitutional analog are inapplicable at the sanity phase of a Wisconsin criminal trial.

The absence of previous concern about the issue reveals another reason why Wisconsin's claim that its unique insanity trial is exempt from Confrontation Clause protections is too parochial and limited in significance to require resolution by this Court. As the State repeatedly reminded the

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[2]The Wisconsin courts, as evidenced by their application of the Sixth Amendment confrontation right in this very case, routinely and unquestioningly accept that the insanity phase of a Wisconsin criminal trial is a part of the trial to which the Sixth Amendment applies. *See, e.g., State v. Lindh*, 161 Wis. 2d 324, 468 N.W.2d 168 (1991); *State v. Smith*, 117 Wis. 2d 399, 414, 344 N.W.2d 711, 718 (Ct. App. 1983) (applying Confrontation Clause to insanity phase but finding any possible error harmless).

courts below, Wisconsin's bifurcated procedure is "unique." *See, e.g.*, original panel brief for James P. Murphy in the United States Court of Appeals for the Seventh Circuit at 17, 20, *Lindh v. Murphy*, Case No. 95-3608 (7th Cir.). The issue it presents is thus a one-state issue, and, moreover, an issue that is particularly inappropriate for federal certiorari because Wisconsin has never even tried to make it an issue in the courts of *that state*. Wisconsin has cited not a single case in which a court in Wisconsin (or any other state) has held that the Confrontation Clause is inapplicable at the insanity phase of a criminal trial, whether the proceedings are bifurcated or not. There is no split among the lower courts or state courts, or even any decisions suggesting the issue is one that has to any degree vexed the courts. The issue simply has not posed any problem to any state, including Wisconsin.

Certiorari could hardly be less appropriate, given the absence of any state court concern about or attention to the matter, because the issue turns entirely on the scope and definition of Wisconsin's unique sanity phase trial *under state statutory and decisional law*. Although we are happy to demonstrate why, *under state law*, Wisconsin's sanity proceeding is nothing more or less than a bifurcated mechanism for adjudicating the criminal defense of insanity—and we do so in an addendum to this brief in opposition—the central point is that this is not a matter for this Court to consider in the first instance.

There is a final reason why the State's principal claim is not worthy of certiorari: The decision below is dictated by this Court's holding in *Specht v. Patterson*, 386 U.S. 685 (1967), which applied confrontation principles to "dispositional" proceedings that turn on findings about mental illness. In *Specht* the defendant was convicted of "indecent liberties," carrying a potential sentence of 0 to 10 years in a correctional facility. At a separate proceeding a jury decided whether to

sentence Specht as a "sex offender" based on whether or not it thought he was "mentally ill" and an "habitual offender," in which case the possible sentence was one day to life in a mental facility, depending on whether his illness was cured. Addressing the state's claim that the second phase was only a sentencing proceeding at which the Confrontation Clause would not apply, this Court analyzed the actual effect of the proceeding "[a]s a practical matter" and decided that Colorado had identified two separate crimes—indecent liberties *without* habitual offender status and mental illness, with a minimum sentence of 0 years in prison and a maximum of 10 years; and indecent liberties *with* habitual offender status and mental illness, carrying a minimum sentence of one day in a state mental facility and a maximum of life imprisonment.

In both *Specht* and at Lindh's trial, the proceedings were bifurcated, the second phase determined the permissible length (and location) of incarceration, the determinative question was the same (mental disease), and the witnesses involved were the same (psychiatrists). "As a practical matter," at stake in the proceeding at which Specht was forbidden to cross-examine the state's witnesses was whether he could potentially be incarcerated for only a total of 10 years or his natural life—at most a 60-year or 700% increase (assuming he lived 70 years after being sentenced as an adult). At stake in the proceeding at which Lindh was forbidden to cross-examine Dr. Roberts for bias was whether he could potentially be released after 6 months (the minimum term under an "insanity" verdict) or only after 35 years, 7 months, 23 days (the minimum length of the sentence actually imposed)—a 35-year, 4700% increase. "As a practical matter," that is, the criminal law and procedural schemes in *Lindh* and *Specht* are alike—as, appropriately, is the decision below and this Court's decision in *Specht*, that the Confrontation Clause applied.

The only basis for the State's claim that *Specht* is not dispositive here—and the only respect

in which Mr. Lindh's claim is not manifestly *a fortiori* from *Specht*—is that Specht's second-phase proceeding affected his maximum incarceration period while Lindh's affected his *minimum* incarceration period. This is literally a distinction without a difference. Nothing in *Specht*, nothing in the Confrontation Clause, and nothing said or hinted by the State remotely suggests the vaguest, most vagrant reason why the distinction could make any difference. If *Specht* does not dictate the applicability of the Confrontation Clause to Lindh's sanity trial, no constitutional decision of this Court has precedential value beyond its individual, episodic circumstances.

Specht reveals why there is no conflict in the courts on the applicability of the Confrontation Clause to the insanity defense, and why this issue is not of importance in Wisconsin or anywhere else: the appropriate decision, and the one reached below, is compelled by this Court's precedents.

II. WHETHER THE SEVENTH CIRCUIT ERRED IN ITS APPLICATION OF SETTLED CONFRONTATION CLAUSE LAW TO THE SPECIFIC FACTS OF THIS CASE DOES NOT PRESENT ANY NOVEL OR SIGNIFICANT QUESTIONS WARRANTING REVIEW BY THIS COURT.

In the end, therefore, Wisconsin's certiorari petition comes down to a single proposition: this Court should intervene to correct what Wisconsin believes to be the Seventh Circuit's error in applying the well-established Confrontation Clause principles enunciated in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), to the particular circumstances of this case. Wisconsin's claim of error is unfounded; and even if it were not, there is no reason for this Court to accept the error-correcting role which the State presents to it.

The State concedes that the Seventh Circuit accurately articulated the Confrontation Clause principles established in *Van Arsdall*, as well as *Davis v. Alaska*, 415 U.S. 308 (1974), "that the defendant is entitled to cross-examine a witness about potential sources of bias, but that the trial

judge may place limits on the examination to prevent what the rules of evidence call 'the danger of unfair prejudice, confusion of the issues, or misleading the jury'. Fed.R.Evid. 403." (Pet. App. A.3-4.)

The State's sole claim, therefore, is that the trial court had the "discretion" to forbid any and all cross-examination into Dr. Roberts's bias. But *Van Arsdall* makes clear that the discretion the Confrontation Clause allows is only the discretion to *limit* cross-examination for bias that may arise when a witness is himself subject to the punitive powers of the state. Indeed, the precise holding of *Van Arsdall* was that the discretion permitted under the Confrontation Clause does not include discretion to "prohibit[] *all* inquiry into the possibility that [the prosecution's key witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." 475 U.S. at 679 (emphasis in original). The Seventh Circuit's decision that the total ban on cross-examination of Dr. Roberts for such bias violated the Confrontation Clause was compelled by *Van Arsdall*. The issue provides no basis for certiorari review.[3]

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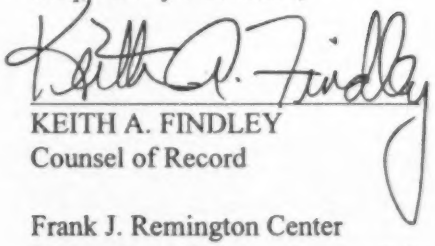
[3]The State's attempt to manufacture an issue by complaining that the Seventh Circuit decision turns trial judges into "co-counsel for the defense" (Cert. Pet. at 26), similarly does not merit the attention of this Court. The Seventh Circuit merely applied settled law by recognizing that the trial court had the authority, short of banning all cross-examination, to place reasonable limitations on the cross-examination. *Van Arsdall* itself recognized that a court may and should consider reasonable limitations on cross-examination, short of barring all inquiry into bias. 475 U.S. at 679. *See also Chipman v. Mercer*, 628 F.2d 528, 533 (5th Cir. 1980); *United States v. Sasson*, 62 F.3d 874 (7th Cir. 1995); *State v. Lindh*, 161 Wis. 2d 342, 379, 468 N.W.2d 168, 189 (1991) (Abrahamson, J., dissenting).

Wisconsin's harmless error objections are similarly meritless. Judge Easterbrook's opinion for the Seventh Circuit cited and applied the appropriate law under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Judge Easterbrook appropriately noted that Dr. Roberts was the state's star psychiatric witness, and that the case came down to a battle of the experts (the two other psychiatrists testified more favorably for the defense). Pet. App. A.5-6. He then observed that the State had unfairly portrayed Dr. Roberts's credentials as impeccable, while knowing that the defense was precluded from cross-examining Roberts to show the contrary, or to show bias. Under these circumstances, Judge Easterbrook concluded, the erroneous bar to cross-examination for bias was of heightened

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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significance, and could not be called harmless. (*Id.*) All four Wisconsin Judges who found error and therefore reached the harmless error issue—the three unanimous court of appeals judges and Justice Abrahamson in her supreme court dissent—considered the same factors and similarly determined that the error was not harmless. *See State v. Lindh*, 156 Wis. 2d 768, 457 N.W.2d 564, 570-71 (Ct. App. 1990); *State v. Lindh*, 161 Wis. 2d 324, 468 N.W.2d 168, 189 (1991) (Abrahamson, J., dissenting).

ADDENDUM

EXPLANATION OF WISCONSIN'S INSANITY DEFENSE DEMONSTRATING ITS ROLE AS AN AFFIRMATIVE DEFENSE TO CRIMINAL LIABILITY UNDER STATE LAW

Analysis of Wisconsin's procedure, under state statutory and decisional law, for trying the insanity defense demonstrates that it is an important part of the criminal proceeding for determining whether a defendant may be adjudicated "guilty"—to which the Confrontation Clause therefore applies. Wisconsin's insanity phase is "dispositional" in exactly the sense that a jury's determination that a defendant is guilty of second rather than first degree burglary, or has a total or partial defense, is dispositional.

Under state law the insanity phase is expressly part of a "continuous trial" to a single jury, and results in entry of a judgment of "guilty" or "not guilty by reason of mental disease or defect." Wis. Stat. § 971.165(1). The state is wrong, therefore, in maintaining that the insanity phase has nothing to do with determining guilt or innocence. *State v. Koput*, 142 Wis. 2d 370, 418 N.W.2d 804 (1988), the case Wisconsin relies upon most heavily, affirms that a finding of not guilty by reason of mental disease or defect, unlike any determination that can be made at sentencing, "would exonerate from criminal responsibility a defendant previously found guilty." 142 Wis. 2d at 384.[4] *See also State v. Randall,* 192 Wis. 2d 800, 833, 532 N.W.2d 94, 107 (1995) (insanity verdict is an "acquittal by reason of insanity"); *State v. Leach*, 124 Wis. 2d 663, 370 N.W.2d 240 (1985) (an

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[4]The State's attempt to equate an insanity acquittal with sentencing fails. The Wisconsin courts are clear that an insanity acquittal and commitment "is, plainly, not a sentence ... . [The defendant] has not been convicted or 'found guilty' of a crime.'" *State v. Harr*, 211 Wis. 2d 584, 568 N.W.2d 307, 308 (Ct. App. 1997). Indeed, in other cases the State itself has even conceded that an insanity commitment is not a "sentence" as that term is used under Wisconsin law. *State v. Szulczewski*, 209 Wis. 2d 1, 6, 561 N.W.2d 781, 783 (Ct. App. 1997).

insanity verdict is an "acquit[tal]"). It is for this reason, as the Wisconsin Supreme Court noted, that a judgment of conviction was entered against Lindh only *after* the jury verdict at the insanity phase. *State v. Lindh*, 161 Wis. 2d 324, 334, 468 N.W.2d 168, 170 (1991).

Under Wis. Stat. § 971.165(1) a defendant may couple a plea of not guilty with a plea of not guilty by reason of mental disease or defect. Section 971.165(1)(a) then provides: "There shall be a separation of the issues with a sequential order of proof *in a continuous trial.* The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second." (Emphasis added.) Section 971.15(3) provides that "[m]ental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable degree of certainty by the greater weight of the credible evidence." This affirmative defense, like any other affirmative defense, is a question of fact tried to the jury, not a question of law for the court to decide. *State v. Leach*, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985).

If the jury finds the defendant not guilty after the first phase, it must enter a judgment of acquittal. Section 971.165(1)(d). If, however, the jury finds the defendant guilty at the first phase, judgment does not enter, but instead the case continues to the second phase. At the end of the second phase, the jury either finds the defendant not guilty by reason of mental disease or defect, or guilty, and the court only then enters judgment accordingly. Section 971.165(3).

From there, the court moves to the final phase of the proceedings—a sentencing hearing if the defendant was found guilty, or a commitment hearing pursuant to § 971.17(2)(a) if the defendant was found not guilty by reason of mental disease or defect. If the latter, the court must commit the person to the department of health and social services (rather than the department of corrections) for

a specified period not exceeding two-thirds of the maximum term of imprisonment that could have been imposed, unless the maximum term of imprisonment is life, in which case the commitment can be for life. Section 971.17. Every six months thereafter, the committed person may petition for conditional release. Section 971.17(4)(a). Importantly, the court "*shall* grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released." Section 971.17(4)(e) (emphasis added). A person conditionally released can thereafter petition the court to terminate the commitment order altogether. Section 971.17(5).

In her separate opinion at the time of the Seventh Circuit's original en banc consideration of the case, Judge Wood reached the merits, having concluded that the AEDPA did not bar review. In an analysis that the Seventh Circuit panel later found persuasive upon remand from this Court (Pet. App. A.3), Judge Wood ably explained why the insanity phase is an integral part of the proceedings to which the Confrontation Clause applies. She explained that

> no matter how for purposes of state law Wisconsin wishes to characterize phase two, it is clear that it is the definitive step that yields either a finding of criminal responsibility for the offense, and hence incarceration, or a finding of no criminal responsibility, and hence hospitalization for as little as six months or as much as a lifetime. ...
>
> It is undisputed that the second phase trial begins with a plea of "not guilty by reason of mental disease" and ends with a jury verdict of guilty or not guilty. Like all jury verdicts of guilty or not guilty, that is "dispositive" in the sense that it governs what kind of further proceedings will be required, but it is not "dispositive" in the same way a sentencing proceeding is. At the risk of stating the obvious, the purpose of a sentencing hearing is to pronounce the sentence, and the jury's phase two verdict does not even begin to address that subject. A sentence might be a fine or incarceration, or some combination of the two. It might include a period of probation or supervised release; construing the term broadly, it might even include

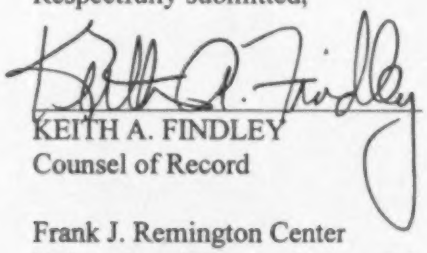
> commitment to a mental institution for a period of years. These issues are simply not before the court or the jury during the phase two trial in Wisconsin. Its sole purpose is instead to decide whether the person is criminally responsible, and hence will receive a criminal sentence, or if the person is not to be held responsible and instead is to receive involuntary commitment to a mental institution. (The latter, of course, occurs every day in contexts far removed from the criminal justice system.) The fact that the verdict of "guilty" from phase one stands does not distinguish this from many other situations—such as self-defense, heat of passion, or justification—where it is clear that the defendant committed the criminal act, but he will not be punished for it. Furthermore, the analogy to parole or release under an indeterminate sentencing scheme does not hold up. No such system of which I am aware confers an *entitlement* on the defendant to win release unless the court finds by *clear and convincing evidence* that he must remain incarcerated. Yet this is exactly how the commitment rules in Wisconsin operate for individuals found not to be criminally responsible for their acts. See Wis. Stat. Ann. § 971.17(4)(d), (5).
>
> The Supreme Court has always required application of the Confrontation Clause to proceedings that begin with a plea of not guilty and conclude with a finding of guilt or acquittal. [Citing *Cruz v. New York*, 481 U.S. 186, 190, 107 S.Ct. 1714, 1717, 95 L.Ed.2d 162 (1987); and *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067-68, 13 L.Ed.2d 923 (1965).] More than that, it has applied the Confrontation Clause to capital sentencing proceedings, where it is true that the only difference is in the nature of the sentence imposed (albeit an exceptionally important difference), explicitly recognizing the need for adversarial debate in such a context. See generally *Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) ... . The plain fact here is that Lindh could, in the words of the Wisconsin Supreme Court, have been "relieve[d] ... of the sanctions for criminal conduct" at the end of the phase two proceeding. See *Koput*, 418 N.W.2d at 812. It is no expansion of clearly established Supreme Court law to find here that stakes of this magnitude in the proceeding bring the Confrontation Clause into play, as the Wisconsin Supreme Court itself recognized.

Lindh v. Murphy, 96 F.3d at 882-83 (en banc) (Wood, J., dissenting) (Pet. App. A.59-61) (emphasis in original).

The Seventh Circuit and the Wisconsin courts were correct in concluding that under state law, the insanity phase of a Wisconsin trial is part of the adjudicatory machinery for determining whether a defendant can be found criminally guilty. The Court thus should decline the State's

invitation to this Court to re-examine the state law that dictates this conclusion.

Respectfully submitted,



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